In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY H. ALBRECHTSEN and MOUNTAIN STATES RESOURCE CORPORATION, PETITIONERS

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

SANFORD SAGALKIN,
Acting Assistant Attorney General,

JACQUES B. GELIN,
GLEN R. GOODSELL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1402

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v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-21 to A-30) is reported at 570 F.2d 906. The district court's findings of fact and conclusions of law (Pet. App. A-5 to A-20) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1978. The petition for a writ of certiorari was filed on April 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the doctrine of estoppel requires the Secretary of the Interior to reinstate portions of petitioners' applications for coal prospecting permits.

STATEMENT

In 1968, petitioner Albrechtsen filed five applications for coal prospecting permits with the Interior Department's Bureau of Land Management (BLM). The applications covered approximately 12,885 acres in Utah (Pet. App. A-22). The Land Office of the BLM subsequently issued decisions rejecting one of the applications in its entirety and rejecting the remaining four in part, with the notation that other portions of the four applications "may be allowed" if the applicant would provide a bond with approved surety and execute certain stipulations (*ibid.*). The decisions informed the applicant of his right to appeal to the Director of the BLM and of the 30-day time limit for compliance with the stated conditions. Their pertinent language, which is central to the current dispute, was as follows (*ibid.*):

> Thirty days from receipt of this decision are allowed in which to meet the requirements above indicated or appeal to the Director, Bureau of Land Management. If no action is taken within the time allowed, the case will be closed on the records of this office, as to the available lands, without further notice.

Petitioner Albrechtsen submitted timely appeals to the Director of the BLM but did not comply with the prerequisites for approval of portions of the four applications. The Director of the BLM affirmed the decisions of the Land Office and granted petitioner the right of further appeal to the Secretary of the Interior (Pet. App. A-13, A-22 to A-23). Petitioner Albrechtsen filed such appeals and later assigned an interest in his applications to petitioner Mountain States Resources Corporation (Pet. App. A-8, A-13, A-23).

Before deciding the appeals, the Secretary issued Order No. 2952, which imposed a moratorium on the issuance of coal prospecting permits "in order to allow the preparation of a program for the more orderly development of coal resources upon the public lands of the United States * * *, with proper regard for the protection of the environment" (Pet. App. A-23). Relying on Order No. 2952, the Secretary, acting through the Board of Land Appeals, finally rejected petitioners' applications and dismissed the appeals (Pet. App. A-24). Petitioners then filed this suit in the United States District Court for the District of Utah, seeking to have the applications reinstated.

Initially, petitioners complained about the wording of the BLM decisions. They charged that the decisions were ambiguous and had not adequately informed Albrechtscn that he could appeal to the Director and simultaneously attempt to comply with the prerequisites for approval of those portions of the applications that had not been rejected (Pet. App. A-24; III R. 51-53, 57-58).[1] Petitioners also claimed that the BLM decisions had misled Albrechtsen into believing that a timely appeal would toll the running of the 30-day period allowed for compliance with the BLM conditions (III R. 5; see also III R. 98).

Subsequently, petitioners filed an amended complaint in which they alleged that, in response to Albrechtsen's inquiries, BLM officials had explicitly represented that he could not appeal and at the same time provide the required surety bond and stipulations so as to obtain BLM approval of parts of the applications (Pet. App. A-24). Petitioners further alleged that BLM officials had assured Albrechtsen that "no action would or could be taken during the appeal period which would jeopardize or interfere in any manner with" his ultimate receipt of permits for the lands covered by the unrejected portions of the applications (III R. 98).

Petitioners sought a judgment requiring the Secretary to reinstate the appeals and consider them without reference to Order No. 2952. They also sought a declaration that, if petitioners complied with the conditions stated in the BLM decisions, the Secretary

[1] "R." refers to the record on appeal in the court of appeals.

lacked power to deny those portions of the applications that had not been rejected by the BLM.

After an evidentiary hearing, the district court (Judge Ritter) concluded that subordinate BLM officials had given Albrechtsen erroneous advice respecting his appeal rights and, consequently, that petitioners should be given 30 days from the date of the district court's judgment in which to comply with the conditions stated in the original BLM decisions (Pet. App. A-18). The court ruled that, if there was such timely compliance, the Secretary would be estopped from denying the portions of the permit applications not rejected by the BLM (Pet. App. A-17 to A-18).[2]

The court of appeals reversed (Pet. App. A-21 to A-30). It held that the BLM decisions had sufficiently

[2] Apart from the estoppel point, the court held that Order No. 2952 could not serve as the basis for denial of petitioners' applications because the Secretary had issued that Order without filing the environmental impact statement allegedly required by Section 102 of the National Environmental Policy Act, 83 Stat. 853, as amended, 42 U.S.C. (and Supp. V) 4332 (Pet. App. A-18 to A-19). The court of appeals, relying on its decision in *Hunter* v. *Morton*, 529 F. 2d 645 (C.A. 10), rejected this view (Pet. App. A-29 to A-30). Order No. 2952 suspended the issuance of coal prospecting permits while the Secretary prepared a suitable program for the development of coal resources on public lands "with proper regard for the protection of the environment." In May 1976, the Secretary instituted such a program through regulations promulgated under authority granted by the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. 181-287. See 41 Fed. Reg. 20252 (codified at 43 C.F.R. Part 3040). The Secretary filed a thorough environmental impact statement in connection with these new regulations (Pet. App. A-30). Petitioners have now abandoned the claim of a NEPA violation.

advised Albrechtsen of his appeal rights and of the need to proceed promptly if he wished to perfect the unrejected portions of the permit applications. The court also held that the "uncorroborated self-serving testimony" of petitioner Albrechtsen concerning the advice he allegedly received from BLM officials constituted an insufficient basis for invoking estoppel against the Secretary (Pet. App. A-26 to A-29).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or other courts of appeals, and does not warrant further review.

1. On a prior occasion the court of appeals considered the language used by the BLM to inform applicants for coal prospecting permits of their right to appeal BLM decisions. *Hunter* v. *Morton*, 529 F.2d 645 (C.A. 10), decided in 1976, involved facts essentially identical to those presented here (see Pet. App. A-25 to A-26). Appellants in that case were petitioner Mountain States Resources Corporation and Daniel Hunter (petitioner Albrechtsen's brother). Hunter filed three applications for coal prospecting permits. The BLM rejected one in its entirety and the other two in part. With respect to the unrejected portions of the applications, the BLM stated that the desired permits "may be allowed" on receipt of an approved surety bond and properly executed Geological Survey stipulations. Then, using the same language employed here (see p. 3, *supra*), the BLM decisions informed

Hunter that he had 30 days to meet the stated requirements or appeal to the BLM Director. Like Albrechtsen here, Hunter submitted a timely appeal but made no effort to comply with the BLM conditions. Eventually, the Secretary denied Hunter's applications in reliance on Order No. 2952.

Hunter and Mountain States Resources Corporation filed suit in the United States District Court for the District of Utah, making the same complaint about the allegedly ambiguous wording of the BLM decisions that petitioners raise here. The district court (Judge Anderson) granted summary judgment for the Secretary, and the court of appeals affirmed. After reviewing the disputed paragraph, the court of appeals stated (529 F. 2d at 648):

> The Decisions leave much to be desired in the way of clarity in the notice of right to appeal a portion of the Decisions. This wording is obviously standard for an application rejected in its entirety; however, it is sufficient to advise the applicant to take some action as to the acreage not rejected if he wants to move toward a perfected application. The applicant had a duty to respond or react to the Decision in its entirety if he wanted to prompt administrative action. * * *

The court of appeals in this case relied on its earlier reasoning in *Hunter*, and that reasoning was correct. Nothing in the BLM decisions precluded petitioner Albrechtsen from proceeding on both the appeal and compliance fronts simultaneously. The decisions instructed Albrechtsen that, if he wished to appeal to

the Director, he had to adhere strictly to the regulations governing appeal, 43 C.F.R. Subpart 1842 (1970) (III R. 11-18). Those regulations did not bar Albrechtsen from submitting his appeal and at the same time attempting to fulfill the prescribed prerequisites for partial approval of the permit applications. Neither the regulations nor the BLM decisions indicated that the filing of an appeal would toll the time allowed for compliance with the BLM conditions. Under these circumstances, petitioners should not benefit because of a mistaken failure to provide the necessary bond and signed stipulations within the 30 days allotted by the BLM.

2. The court of appeals also properly rejected petitioners' argument that the Secretary should be estopped from denying the portions of the permit applications not rejected by the BLM, if petitioners now comply with the conditions specified in the BLM decisions. Petitioners allege that BLM officials gave Albrechtsen incorrect advice when he requested guidance after receiving the BLM decisions. The only support for this claim is the testimony of Albrechtsen himself at the district court hearing on February 10, 1976 (Pet. App. A-27). The hearing was held two weeks after the decision of the court of appeals in *Hunter*. In an attempt to avoid the precedential effect of that ruling, petitioners argued in the district court and the court of appeals that Albrechtsen's testimony about the erroneous remarks of BLM officials was sufficient to justify a different result. The BLM officials called as witnesses by petitioners could not recall meeting with Albrechtsen or giving him the faulty instructions he claims to have received. Characterizing the evidence presented by petitioners as "woefully weak," the court of appeals correctly held that Albrechtsen's testimony alone could not support application of the doctrine of estoppel against the Secretary (Pet. App. A-27).[3] A contrary result would permit a finding of estoppel against the government in any situation in which a dissatisfied claimant of public benefits alleges he was misled by a government employee.

In addition, as the court of appeals accurately observed, even if Albrechtsen's testimony were true and BLM officials did dispense faulty advice, this case would not be an appropriate one in which to apply estoppel against the Secretary. Under Section 2(b) of the Mineral Leasing Act of 1920, 30 U.S.C. 201(b), the Secretary was authorized to exercise his discretion in deciding whether to issue coal prospecting permits.[4] The Secretary was thus entitled to deny Al-

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[3] Notwithstanding petitioners' contention to the contrary (Pet. 11-12), the court of appeals did not reevaluate the witnesses' testimony and thus usurp the fact-finding function of the district court. The court of appeals simply decided, as a matter of law, that in the context of the entire record Albrechtsen's testimony was inadequate to support petitioners' estoppel claim.

[4] Section 2(b) was repealed by the Act of August 4, 1976 (Pub. L. 94-377), 90 Stat. 1085, which replaced the coal prospecting permit system with a system of non-exclusive exploratory licenses. See H.R. Rep. No. 94-681, 94th Cong., 1st Sess. 23 (1975), and S. Rep. No. 94-296, 94th Cong., 1st Sess. 15 (1975).

brechtsen's applications in the first instance. See *Udall* v. *Tallman*, 380 U.S. 1, 4; *Arnold* v. *Morton*, 529 F. 2d 1101, 1105 (C.A. 9); *Hunter* v. *Morton*, *supra*. The original BLM decisions stated only that the unrejected portions of the permit applications "may be allowed" on compliance with the stated conditions. This declaration did not constitute an irreversible commitment to issue the desired permits if Albrechtsen provided the necessary bonds and stipulations. Even if Albrechtsen had complied immediately with the BLM conditions, the Secretary would not have been bound to approve those portions of the applications that had not been rejected previously.

Accordingly, petitioners may claim no property interest in the permits they sought. At worst, the incorrect information allegedly received from BLM officials deprived Albrechtsen of an opportunity to obtain partial approval of his applications before the Secretary issued Order No. 2952. But, as this Court has held, erroneous advice from subordinate federal agents ordinarily does not estop the government. See *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384. See also *Immigration and Naturalization Service* v. *Hibi*, 414 U.S. 5, 8-9; *United States* v. *California*, 332 U.S. 19, 39-40; *Atlantic Richfield Co.* v. *Hickel*, 432 F. 2d 587, 591-592 (C.A. 10). As the court of appeals concluded in *Montana Power Co.* v. *Federal Power Commission*, 185 F. 2d 491, 497 (C.A. D.C.), "[t]he Government is too vast, its operations too varied and intricate, to put it to the risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SANFORD SAGALKIN,
Acting Assistant Attorney General.

JACQUES B. GELIN,
GLEN R. GOODSELL,
Attorneys.

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